Saadian bte Karim v Ong Ting Chai

HIGH COURT (MELAKA) — CIVIL SUIT APPEAL 11-7-1996
AUGUSTINE PAUL JC
14 AUGUST 1996

Civil Procedure *— Appeal — Error in order made by magistrate — Whether appellate court can interfere — Courts of Judicature Act 1964 ss 29 & 33*

Landlord and Tenant *— Notice to quit — Monthly tenancy — Notice to quit did not expire at the end of current period — Whether such notice valid — Principles governing notice to quit*

Landlord and Tenant *— Controlled premises — Premises — Definition of 'premises' — Whether land included — Control of Rent Act 1966 s 2*

Landlord and Tenant *— Tenancy coupled with equity — Repairs carried out by tenant — Whether there was encouragement by the plaintiff — Whether passive encouragement sufficient to create equity — Remedies to satisfy the equity*

The plaintiff commenced proceedings against the defendant and some others, inter alia, for vacant possession of certain premises. The allegation was that the plaintiff had rented the premises to the defendant at RM50 per month beginning 1 January 1993. On 16 June 1993, the plaintiff through her solicitors informed the defendant that the tenancy was terminated and that the defendant was to deliver vacant possession of the premises on or before 15 July 1993. The defendant failed to do so and the plaintiff again informed the defendant in a second notice to quit dated 18 October 1993 about the termination of the tenancy and asked him to deliver vacant possession on or before 17 November 1993. The defendant again failed to do so. The defendant on the other hand denied that the plaintiff was the owner of the premises. The defendant claimed to have bought the premises from the previous owner in 1935. He occupied the premises from that date and paid the plaintiff an annual payment of RM20 as rent for the plaintiff's land. In 1987–1988, the plaintiff claimed RM20 per month. The defendant made the payments until 1 January 1993 after which the plaintff refused to accept the monthly payment in February 1993. The magistrate dismissed the plaintiff's claim with costs. However as an alternative the plaintiff was allowed vacant possession of the premises on condition that the plaintiff paid the defendant compensation or damages amounting to RM10,000 in six months. The plaintiff appealed against the whole of the decision. The issues before the High Court were (a) whether the plaintiff was the owner of the premises; (b) whether the Control of Rent Act 1966 applied; (c) whether the defendant had acquired a tenancy coupled with an equity; and (d) whether the notice to quit was served on the defendant, and its legal effect. The court also had to consider the validity of the alternative order made by the learned magistrate.

Held, dismissing the appeal:

(1) There was therefore no reason to disbelieve the evidence of the defendant when he said that the building belonged to him and that he had only rented the land (see p 656E).

(2) The plaintiff abandoned her pleading during the trial and agreed with the case for the defendant on the issue of the ownership of the premises. Where a party in the course of conducting his case abandoned his pleadings, his case became highly suspect and as a result, the whole case of the plaintiff had to be viewed with caution (see p 656G–H); *PR Panikar v Chwee May Kwong* [1958] MLJ 136 followed. In any event if the plaintiff wanted judgment on the new facts that had emerged, then she ought to have amended her pleadings. In default of any amendments the action had to be dismissed (see p 656H–I); *Wong See Lang v Saraswathy Ammal* [1954] MLJ 141 followed.

(3) Land was not 'premises' within the meaning of the Control of Rent Act 1966 ('the Act') and was therefore not protected by the Act. Since the plaintiff had only rented the land to the defendant, the Act had no application (see pp 657B–658B); *Evelyn Saw Hee Li v Gan Tit Sun* [1959] MLJ 146, *Tan Tuan Chin v Chen Wei Yin & Anor* [1967] 2 MLJ 222 and *Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321 followed.

(4) It was not necessary for there to be active encouragement on the part of the landlord to raise an equity in favour of the tenant. According to the facts the plaintiff did not raise any objections to the repairs carried out by the defendant. The plaintiff's house was behind the defendant's house by about ten feet only and the plaintiff was obviously aware of what was going on yet continued with the tenancy. This clearly amounted to passive encouragement on the part of the plaintiff which was sufficient to create an equity in favour of the defendant (see p 659A–D); *Inwards & Ors v Baker* [1965] 2 QB 29 and *Siew Soon Wah & Ors v Yong Tong Hong* [1973] 1 MLJ 133 followed.

(5) Various remedies were available where a tenancy coupled with an equity had arisen. However, if the evidence showed that the prejudice suffered by the person who made the improvements had been fully satisfied, or that he had already had 'sufficient satisfaction' for his expenditure, he will obtain no further relief for his expenditure (see p 659E–F); *A-G v Balliol College Oxford* (1774) 9 Mod 407, *Kalimuthu v S Kandiah* [1976] 2 MLJ 217 and *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352 followed. In this case there was no evidence of 'sufficient satisfaction' of the equity. The defendant was therefore entitled to compensation (see p 659I).

(6) In the case of periodic tenancies of less than a year, the notice to quit must be one full period, expiring at the end of a completed period. If insufficient notice had been given, it would be ineffective

to terminate the tenancy. As the tenancy commenced on the first day of a month, the notice to quit, purporting to expire in the middle of a current month, was defective (see pp 660I–661E); *Mohamed Din v Sockalingam Chettiar* [1946] MLJ 134, *Yeoh Pang Kwan v William Janz* [1972] 1 MLJ 25 and *Abdul Murthalib bin Hassan v Maimoon bte Haji Abd Wahid* [1992] 2 MLJ 108 followed.

(7) As a notice to quit is a critical piece of evidence in the proceedings for vacant possession, it ought to have been tendered as evidence. Its importance assumed monumental significance in light of the defendant's denial of receipt of the notice. The plaintiff failed to prove service of the notice. In the circumstances, this was an appropriate case where s 114(g) Evidence Act 1950 should be invoked against the plaintiff. Accordingly, the tenancy had not been effectually terminated for three reasons, namely (i) that the notice to quit was defective; (ii) that it was not served on the defendant; and (iii) that it was not tendered in evidence (see p 661G–I).

(8) The magistrate's order in dismissing the action and in the same breath, making an alternative order was tantamount to dismissing the claim and at the same time allowing it. In the light of his findings on the notice to quit he ought to have just dismissed the action with costs. The alternative order would thus be deleted (see p 662E–F).

[Bahasa Malaysia summary

Plaintif telah memulakan tindakan terhadap defendan dan beberapa orang lain, antara lainnya, untuk milikan kosong premis tertentu. Dakwaannya adalah bahawa ia telah menyewakan premis tersebut kepada defendan pada kadar RM50 sebulan mulai 1 Januari 1993. Pada 16 Jun 1993, plaintif melalui peguamcaranya telah memberitahu defendan bahawa penyewaannya telah ditamatkan dan bahawa defendan terpaksa menyerahkan milikan kosong premis tersebut pada atau sebelum 15 Julai 1993. Defendan telah gagal berbuat demikian dan plaintif telah memberitahu defendan sekali lagi dalam satu notis keluar kedua bertarikh 18 Oktober 1993 bahawa penyewaan telah ditamatkan dan meminta supaya ia menyerahkan milikan kosong premis tersebut pada ataupun sebelum 17 November 1993. Sekali lagi defendan telah gagal berbuat demikian. Defendan pula telah menafikan bahawa plaintif merupakan tuanpunya premis tersebut. Defendan telah menuntut bahawa ia telah membeli premis tersebut dari bekas tuanpunya dalam tahun 1935. Dia telah menduduki premis tersebut sejak tarikh itu dan telah membayar plaintif suatu bayaran tahunan sebanyak RM20 sebagai sewa untuk tanah plaintif. Dalam tahun 1987–1988, plaintif telah menuntut sebanyak RM20 setiap bulan. Defendan telah membuat bayaran tersebut sehingga 1 Januari 1993 setelah mana plaintif telah enggan menerima bayaran bulanan dalam bulan Februari 1993. Majistret telah menolak tuntutan plaintif

dengan kos atau secara alternatif, plaintif diberikan milikan kosong dengan syarat bahawa defendan diberi pampasan atau ganti rugi sebanyak RM10,000 dalam masa enam bulan. Plaintif telah merayu terhadap keseluruhan keputusan tersebut. Isu-isu di hadapan Mahkamah Tinggi adalah (a) sama ada plaintif adalah tuanpunya premis tersebut; (b) sama ada Akta Kawalan Sewa 1966 terpakai; (c) sama ada defendan telah memperolehi penyewaan bersama ekuiti; dan (d) sama ada notis keluar telah disampaikan kepada defendan dan kesan notis tersebut. Mahkamah juga terpaksa mempertimbangkan kesahan perintah alternatif yang dibuat oleh majistret yang bijaksana.

Diputuskan, menolak rayuan tersebut:

(1) Tidak ada sebab untuk menolak keterangan defendan apabila dia menyatakan bahawa premis tersebut adalah kepunyaannya dan bahawa dia hanya menyewa tanah tersebut (lihat ms 656E).

(2) Semasa perbicaraan, plaintif telah mengabaikan plidingnya dan telah bersetuju dengan kes defendan atas isu pemunyaan premis tersebut. Apabila sesuatu pihak dalam mengendalikan kesnya mengabaikan plidingnya, kesnya akan disyaki dan akibatnya, keseluruhan kes plaintif harus diteliti dengan was-was (lihat ms 656G–H); *PR Panikar v Chwee May Kwong* [1958] MLJ 136 diikut. Dalam apa keadaan pun jika plaintif inginkan penghakiman atas fakta baru yang timbul, maka plaintif sepatutnya meminda plidingnya. Dalam ketiadaan pemindaan, tindakan itu terpaksa ditolak (lihat ms 656H–I); *Wong See Lang v Saraswathy Ammal* [1954] MLJ 141 diikut.

(3) Tanah bukannya 'premis' menurut makna dalam Akta Kawalan Sewa 1966 ('Akta tersebut'). Maka ianya tidak dilindungi oleh Akta tersebut. Oleh kerana plaintif hanya menyewakan tanah kepada defendan, maka Akta tersebut tidak terpakai (lihat ms 657B–658B); *Evelyn Saw Hee Li v Gan Tit Sun* [1959] MLJ 146, *Tan Tuan Chin v Chen Wei Yin & Anor* [1967] 2 MLJ 222 dan *Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321 diikut.

(4) Galakan aktif dari tuanpunya tanah tidak diperlukan untuk membangkitkan suatu penyewaan bersama ekuiti bagi pihak penyewa. Mengikut fakta kes plaintif telah tidak membangkitkan sebarang bantahan kepada pengubahsuaian yang dijalankan oleh defendan. Rumah plaintif berada di belakang rumah defendan hanya dengan jarak 10 kaki darinya dan plaintif semestinya mengetahui mengenai apa yang dibuat oleh defendan tetapi telah meneruskan penyewaan tersebut. Ini jelas merupakan galakan pasif oleh pihak plaintif dan adalah mencukupi untuk membangkitkan suatu penyewaan bersama ekuti bagi pihak defendan (lihat ms 659A–D); *Inwards & Ors v Baker* [1965] 2 QB 29 dan *Siew Soon Wah & Ors v Yong Tong Hong* [1973] 1 MLJ 133 diikut.

(5) Berbagai remedi sedia ada apabila satu penyewaan bersama dengan satu ekuiti telah berbangkit. Walau bagaimanapun jikalau keterangan menunjukkan bahawa kemudaratan yang dialami oleh orang yang menjalankan pengubahsuaian telah dipuaskan dengan sepenuhnya, atau bahawa beliau telah mendapat 'kepuasan yang mencukupi' untuk perbelanjaannya, maka dia tidak akan memperolehi relief-relief selanjutnya (lihat ms 659E–F); *A-G v Balliol College Oxford* (1774) 9 Mod 407, *Kalimuthu v S Kandiah* [1976] 2 MLJ 217 dan *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352 diikut. Dalam kes ini, tidak terdapat keterangan yang menunjukkan 'kepuasan yang smencukupi' bagi ekuiti tersebut. Oleh yang demikian, defendan adalah berhak untuk pampasan (lihat ms 659I).

(6) Dalam kes penyewaan untuk tempoh masa yang kurang daripada satu tahun, notis keluar mestilah untuk suatu tempoh masa yang penuh, yang tamat pada akhir tempoh masa yang dipenuhi. Jika notis yang diberikan tidak mencukupi, maka ianya tidak akan berkesan untuk menamatkan penyewaan tersebut. Oleh kerana penyewaan tersebut bermula pada hari pertama sesuatu bulan, notis keluar itu, yang dikatakan tamat pada pertengahan satu bulan, adalah cacat (lihat ms 660I–661E); *Mohamed Din v Sockalingam Chettiar* [1946] MLJ 134, *Yeoh Pang Kwan v William Janz* [1972] 1 MLJ 25 dan *Abdul Murthalib bin Hassan v Maimoon bte Haji Abd Wahid* [1992] 2 MLJ 108 diikut.

(7) Memandangkan bahawa notis keluar adalah sesuatu keterangan yang kritikal dalam prosiding untuk milikan kosong, ianya patut dikemukakan sebagai keterangan. Kepentingannya lebih ketara lagi memandangkan penafian defendan akan penerimaan notis tersebut. Plaintif telah gagal membuktikan penyampaian notis tersebut. Dalam keadaan kes, ia adalah sesuatu kes yang wajar di mana s 114(g) Akta Keterangan 1950 patut digunakan terhadap plaintif. Berikutan dengan itu penyewaan itu telah tidak ditamatkan dengan sempurna untuk tiga sebab, iaitu (i) bahawa notis keluar itu adalah cacat; (ii) bahawa ianya tidak diserahkan ke atas defendan; dan (iii) bahawa ianya tidak dikemukakan sebagai keterangan (lihat ms 661G–I).

(8) Perintah majistret dalam menolak tindakan ini dan pada masa yang sama, memberikan perintah alternatif berjumlah kepada penolakan tindakan dan pada masa yang sama membenarkannya. Memandangkan keputusannya mengenai notis keluar, dia sepatutnya hanya menolak tindakan tersebut dengan kos. Perintah alternatif itu oleh itu akan diketepikan (lihat ms 662E–F).]

Notes

For cases on interference by an appellate court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 346–358.

For cases on definition of premises under the Control of Rent Act 1966, see 9 *Mallal's Digest* (4th Ed) paras 214–222.

For cases on notice to quit on a monthly tenancy, see 9 *Mallal's Digest* (4th Ed) paras 1120–1121.

For cases on tenancy coupled with equity, see 9 *Mallal's Digest* (4th Ed) paras 1242–1244.

Cases referred to

A-G v Balliol College Oxford (1774) 9 Mod 407
A-G of Hong Kong v Humphreys Estate (Queen's Garden) Ltd [1987] AC 114
ALMM Muthu Karuppan Chettiar v Haji Ibrahim [1941] MLJ 150
Abdul Ghaffar v Perbadanan Pembangunan Bandar [1986] 2 MLJ 158
Abdul Murthalib bin Hassan v Maimoon bte Haji Abd Wahid [1992] 2 MLJ 108
Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202
Chen Chi Wei v Khoh Keng Chong [1951] MLJ 204
Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352
Evelyn Saw Hee Li v Gan Tit Sun [1959] MLJ 146
Government of Malaysia v Zainal bin Hashim [1977] 2 MLJ 254
Haslemere Estate Ltd & Anor v Baker & Ors [1982] 1 WLR 1109
Harty v Kolman [1977] 1 NSWLR 674
Huo Heng Oil Co (EM) Sdn Bhd v Tang Tiew Yong [1987] 1 MLJ 139
Indo-Australian Trading Pte Ltd v Pakiri Kothandapani [1986] 1 MLJ 289
Inwards & Ors v Baker [1965] 2 QB 29
Kalimuthu v S Kandiah [1976] 2 MLJ 217
Ko Teck Kin v Watkinson [1961] MLJ 73
Lee Ah Chor v Southern Bank Bhd [1991] 1 CLJ 667
Lim Kien Mok v BH Kevan [1963] MLJ 284
Mohamed Din v Sockalingam Chettiar [1946] MLJ 134
Mok Deng Chee v Yap See Hoi & Ors [1981] 2 MLJ 321
Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374
Neesom v Clackoon (1845) 4 Hare 97
PR Panikar v Chwee May Kwong [1958] MLJ 136
Raffaele v Raffaele [1962] WLR 238
Ramsden v Dyson (1866) LR 1 HL 129
Siew Soon Wah & Ors v Yong Tong Hong [1973] 1 MLJ 133
Soon Peng Yam (Pte) Ltd v Grant Irene [1984] 1 MLJ 153
Tan Tuan Chin v Chen Wei Yin & Anor [1967] 2 MLJ 222
Wong See Lang v C Saraswathy Ammal [1954] MLJ 141
Yeoh Pang Kwan v William Janz [1972] 1 MLJ 25

Legislation referred to

Courts of Judicature Act 1964 ss 29, 33
Control of Rent Act 1966 ss 2, 4
Evidence Act 1950 s 114(g)

Belvinder Kaur (*Chua Brothers, Azzat & Azzat*) for the appellant. A
KP Ng (*KP Ng & Amardas*) for the respondent.

Augustine Paul JC: Saadian bte Karim ('the plaintiff') commenced proceedings against Ong Ting Chai ('the defendant'), Ong Ah Kai, Wee Chee Eng and Haroon bin Baba at the Magistrate's Court at Alor Gajah, B Melaka vide CS No 72–51–1994 for, inter alia, vacant possession of certain premises as enumerated below. The material parts of the plaintiff's statement of claim read as follows:

7 Plaintif telah menyewakan premis-premis tersebut kepada defendan-defendan secara sewaan bulanan dengan bayaran sewaan bulanan C sebanyak RM50 sebulan setiap premis mulai 1 Januari 1993. Premis-premis tersebut telah disewakan seperti berikut:

No Premis	Defendan
2279	Pertama
2280	Kedua
2208	Ketiga D
2283	Keempat

8 Melalui empat surat bertarikh 16 Jun 1993, plaintif melalui peguamnya telah memaklumkan defendan-defendan bahawa penyewaan defendan-defendan di premis-premis tersebut telah ditamatkan dan defendan-defendan dikehendaki menyerahkan pemilikan kosong premis-premis E tersebut kepada plaintif tersebut pada atau sebelum 15 Julai 1993 ('tarikh tersebut').

9 Apabila defendan-defendan telah gagal menyerahkan pemilikan kosong premis-premis tersebut pada tarikh tersebut, plaintif telah sekali lagi memaklumkan defendan-defendan mengenai penamatan penyewaan mereka melalui empat notis berasingan setiap satu bertarikh 18 Oktober F 1993 dan diminta untuk mengosongkan dan menyerahkan semula pemilikan kosong premis-premis tersebut kepada plaintif pada atau sebelum tarikh 17 November 1993.

10 Defendan-defendan hingga ke hari ini enggan, gagal dan/atau cuai untuk menyerahkan kembali premis-premis tersebut dan masih menghuni di premis-premis tersebut hingga kini secara salah dan dikira G sebagai penceroboh.

11 Oleh yang demikian plaintif menuntut terhadap defendan pertama seperti berikut:

(a) penyerahan pemilikan kosong premis No 2279, Batu 29 1/2 Pekan Brisu, 78100 Lubok China, Melaka kepada plaintif dalam tempoh H tujuh (7) hari dari tarikh perintah ini.

The material parts of the defence of the defendant as contained in his statement of defence are as follows:

3 Defendan pertama menafikan bahawa plaintif merupakan pemilik premis yang bernombor 2279 Batu 29 1/2 Pekan Brisu, 78100 Lubok China, I Melaka ('premis tersebut').

4 Defendan pertama mengatakan bahawa beliau adalah pemilik sah premis tersebut di mana beliau telah membeli premis tersebut lebih kurang pada tahun 1935 daripada pemilik terdahulu premis tersebut. Beliau

telah menduduki premis tersebut sejak itu dengan membayar sewa tahunan sebanyak RM20 sebagai sewa tanah kepada plaintif.

5 Hanya pada lebih kurang 1987–1988 pihak plaintif telah menuntut pembayaran sewa tanah sebanyak RM20 untuk setiap bulan. Pihak defendan pertama telah membuat pembayaran sedemikian sehinggalah 1 Januari 1993. Pihak plaintif telah enggan menerima sewa bulanan bagi bulan Februari 1993 walaupun pihak defendan pertama telah cuba membuat pembayaran tersebut.

6 Oleh yang demikian, pihak defendan pertama menafikan keseluruhan kandungan perenggan 7 pernyataan tuntutan pihak plaintif dan meletakkan beban di atas plaintif untuk membuktikan kandungan perenggan tersebut.

7 Daripada 1935 sehinggalah sekarang, pihak defendan pertama telah membuat kerja-kerja pembaikan dan juga membelanjakan wang untuk memperbaiki keadaan premis dari semasa ke semasa. Kerja-kerja ini telah dilakukan tanpa sebarang bantahan dan atau gangguan oleh pihak plaintif sebagai tuan tanah yang mengetahui keadaan tersebut.

8 Oleh yang demikian, pihak defendan pertama mengatakan bahawa telah timbul satu ekuiti bagi pihak defendan pertama yang perlu dipuaskan oleh pihak plaintif sebelum pihak plaintif berhak mendapatkan milikan kosong tanah dan premis tersebut.

9 Selanjutnya dan secara alternatif, sekiranya mahkamah mendapati bahawa premis tersebut adalah kepunyaan plaintif yang telah menyewakan premis tersebut kepada defendan pertama (yang dinafikan), pihak defendan pertama mengatakan bahawa mahkamah mulia ini tidak mempunyai bidang kuasa untuk membicarakan tindakan ini kerana penyewaan premis tertakluk kepada Akta Kawalan Sewa 1966.

10 Pihak plaintif sepatutnya mengambil prosiding di bawah Akta Kawalan Sewa 1966 untuk mendapatkan milikan kosong. Pihak defendan mengatakan bahawa pihak plaintif telah gagal mematuhi peruntukan-peruntukan Akta tersebut. Oleh itu tindakan plaintif mestilah ditolak dengan kos.

11 Pihak defendan pertama menafikan penerimaan surat bertarikh 16 Jun 1993 seperti yang dirujuk di perenggan 8. Tambahan lagi, pihak defendan pertama mengatakan bahawa surat tersebut adalah tidak sah di dalam undang-undang.

12 Pihak defendan pertama menafikan penerimaan surat bertarikh 18 Oktober 1993 seperti yang dirujuk di perenggan 9 pernyataan tuntutan dan meletakkan beban ke atas pihak plaintif untuk membuktikan dengan kukuh.

The trial before the learned magistrate commenced on 22 September 1995 with regard to the first defendant alone. The plaintiff called two witnesses including herself while the defendant apart from giving evidence himself did not call any other witnesses.

The evidence adduced by the parties can be briefly summarized as follows:

The plaintiff (PW1) said that the defendants occupy the land which belongs to her. She then added:

Saya kenal keempat-empat penyewa tanah tersebut. Saya ada kenakan bayaran sewa ke atas penyewa-penyewa ini, saya kenakan sewa RM50 sebulan ke atas keempat-empat penyewa tersebut. Tiap-tiap seorang kena bayar RM50. Satu pintu RM50 sebulan. A

Saya tidak ingat. Mereka telah lama tinggal menyewa di situ. Saya kenakan bayaran sewa RM50 sebulan sejak bulan Januari 1993. Saya tidak benarkan mereka sewa lagi sejak saya beri notis — 16 Jun 1993 — ms 3 ID plaintif. Notis pertama dihantar pada 16 Jun 1993 untuk menamatkan penyewaan. B

Selepas saya hantar notis yang pertama, penyewa tidak mahu keluar. Seterusnya, saya hantar satu lagi notis bertarikh 18 Oktober 1993 untuk kali kedua. Mereka masih juga tidak keluar dan tidak bayar apa-apa sewa tunggakan. C

Under cross-examination she said:

Saya tidak ingat sejak bila saya memiliki tanah tersebut. Saya dapat tanah tersebut sebagai waris pesaka dari nenek saya. Semenjak saya balik kampung, mereka semua memanglah tinggal situ. Masa saya dapat tanah tersebut, memang ada bangunan di atas tanah tersebut. Bangunan tersebut bukan didirikan oleh saya. Saya tidak tahu siapa yang dirikan bangunan tersebut .... D

Orang yang tinggal di sana juga adalah orang yang sama juga. Orang-orang itu telah berada di sana sebelum saya jadi tuan tanah lagi.

Mereka bayar sewa RM50 pada saya. Sejak beri notis untuk keluar dari premis tersebut, penyewa-penyewa belum pernah bayar RM50 sebulan. Sebelum itu, dia ada bayar RM20 sebulan. Sejak penyewa tinggal di sana, saya terima RM20 sebulan. Saya ada hantar notis kepada penyewa untuk naikkan sewa melalui peguam sebab penyewa tak mahu keluar dari tempat tersebut. E

Bila mereka bayar sewa, saya ada keluarkan resit ...

Kandungan ID ms 3 — notis pada bulan Jun, sedangkan sewaan dinaikkan pada 1 Januari 1993. ... F

Saya akui bangunan itu bukan saya punya, cuma tanah saya punya.

Jamilah bte Iskandar Khan (PW2) is the plaintiff's daughter. She handled the transactions relating to the tenancy on behalf of her mother. With regard to the notice to quit she said: G

Saya pengetahuan mengenai notis yang dihantar oleh peguamcara. Penghuni-penghuni rumah tersebut enggan keluar walaupun notis telah di hantar.

She said that at a meeting at the district office attended also by the defendant, the district officer said that the building was not suitable for occupation. H

The defendant, Ong Ting Chai (DW1) in his evidence said:

Rumah tersebut adalah kepunyaan saya sendiri. Saya telah tinggal di rumah tersebut semenjak 1945. Rumah tersebut saya beli dari seorang Melayu. I

He added that his children were born there and produced two birth certificates in support (exhs D1 and D2). He then said:

A Saya setuju, saya adalah pemilik rumah dan hanya penyewa tanah sahaja.

When he was referred to the receipts in respect of his tenancy he said:

> Pada resit tersebut ada dituliskan sewa kedai dan tanah dan kadang-kadang sewa tanah sahaja. Saya pasti saya bayar RM20 untuk sewa tanah sahaja.

B With regard to the repairs he did to the premises and the expenditure incurred in respect of them he said:

> Semenjak mula tinggal di sana, saya ada buat pembaikan ke atas rumah tersebut kalau ada kerosakan. Plaintif tidak ada membantah apa-apa pembaikan yang telah saya buat ke atas rumah tersebut.
>
> C Selama tempoh saya tinggal, saya telah baiki rumah tersebut dengan belanja RM8,000–RM9,000.

When cross-examined on this part of his evidence he said:

> Saya cuma buat anggaran lebih kurang sahaja RM8,000–RM9,000. Saya cuma baiki papan-papan yang reput dan juga ganti atap yang telah rosak
> D dan juga 'frame' untuk atap. Rumah plaintif hanya di belakang rumah saya. Saya anggap plaintif tahu apa yang berlaku di rumah saya. Jarak hanya lebih kurang 10 kaki. Sangat dekat antara rumah saya dengan rumah plaintif. Rumah tersebut adalah rumah saya sendiri dan tidak perlu nak beritahu apa-apa kerosakan yang berlaku di rumah saya.
>
> Tidak, tuan rumah tidak pernah menggalakkan saya untuk baiki rumah
> E saya.

On the issue relating to the notice to quit allegedly served on him he said:

> Saya tidak pernah terima apa-apa surat dari pihak plaintif tetapi pihak plaintif ada beritahu secara lisan yang dia tidak mahu menyewakan tanahnya lagi kepada saya.
>
> F

Both learned counsel made lengthy submissions before the learned magistrate who made the following findings in his grounds of judgment:

> (1) From the evidence adduced it is clear that the premises do not belong to the plaintiff but to the defendant. This is fatal to the plaintiff's case
> G as it is not in accordance with her pleadings.
>
> (2) The defendant had acquired a tenancy coupled with an equity with regard to the premises. The plaintiff, therefore, must pay compensation to the defendant in order to obtain vacant possession of the premises.
>
> (3) As the premises were acquired by the defendant in 1945, the Control of Rent Act 1966 applies and, accordingly, the plaintiff must comply
> H with s 16 of the Act in order to obtain vacant possession.
>
> (4) The notice to quit was not served on the defendant and was not in accordance with law.

The order that the learned magistrate made is in the following terms as stated in his grounds of judgment:

> I
>
> Oleh itu, berdasarkan keterangan-keterangan dan bukti-bukti yang dikemukakan kepada mahkamah, mahkamah dengan ini menolak tuntutan pihak plaintif dengan kos atau secara alternatifnya, plaintif dibenarkan untuk mendapatkan pemilikan ke atas premis tersebut dengan syarat pihak

plaintif membayar pihak defendan satu (1) bayaran pampasan atau pun ganti rugi sebanyak RM10,000 dalam masa enam (6) bulan. A

The plaintiff has appealed against the whole decision. The issues before me as gathered from the judgment of the learned magistrate and the submissions of both learned counsel can be summarized as follows:

(1) Whether the plaintiff was the owner of the premises; B

(2) Whether the Control of Rent Act 1966 applies to this case;

(3) Whether the defendant had acquired a tenancy coupled with an equity; and

(4) Whether the notice to quit was served on the defendant, and its legal effect. C

I shall now deal with the issues that I have outlined.

Whether the plaintiff was the owner of the premises?

It was a finding of fact by the learned magistrate that the premises in question belong to the defendant and not to the plaintiff. I wholeheartedly agree with this finding. It is amply supported by the evidence adduced. In her evidence the plaintiff stated categorically that she did not know who constructed the building and she freely admitted in cross-examination that the building does not belong to her though this contradicts what she had pleaded in para 7 of the statement of claim. She said that what belongs to her is only the land. In the circumstances there is no reason to disbelieve the evidence of the defendant when he said that the building belongs to him and that he only rented the land. D E

The deviation of the plaintiff's evidence from her pleadings on the ownership of the premises requires some consideration. It is settled law that vital and decisive issues must be pleaded (see *Lee Ah Chor v Southern Bank Bhd* [1991] 1 CLJ 667). The ownership of the premises in question in this case is indeed a vital and decisive issue for the plaintiff's case. It was for that reason that she had pleaded in para 7 of the statement of claim that she had rented the premises to the defendant implying that she is the owner of it. The defendant denied this paragraph and alleged that he is the rightful owner of the premises in his statement of defence. The plaintiff abandoned her pleading during the trial and agreed with the case for the defendant on the issue of the ownership of the premises. It amounts to an admission of the defendant's version of this issue thereby rendering that part of the pleading irrelevant. However, there is another matter that arises from this facet of the case. Where a party, in the course of conducting his case, abandons his pleading, then his case becomes highly suspect (see *PR Panikar v Chwee May Kwong* [1958] MLJ 136). The result is that the whole case of the plaintiff will have to be viewed with caution. In any event if the plaintiff wanted judgment on the new facts that had emerged then she ought to have amended her pleadings. In default of any amendments the action has to be dismissed (see *Wong See Lang v C Saraswathy Ammal* [1954] MLJ 141). F G H I

Whether the Control of Rent Act 1966 applies to this case?

It is the view of the learned magistrate that it does. Section 4 of the Act provides that the Act only applies to premises completed before 31 January 1948 situated within a local authority area, provided that the premises are not excluded by the decontrol provisions of the Act. The answer to this issue depends on whether the letting of premises includes the letting of only the land upon which a building has been erected by the tenant. Section 2 of the Act defines 'premises' to mean:

> ... any dwelling, house, flat, factory, warehouse, office, counting house, shop, school and any other building in which persons are employed or work and any part of any premises let or sublet separately and includes any land, outbuildings and appurtenances occupied therewith.

The same section defines 'domestic premises' to mean:

> ... any premises, or any part of any premises, used for human habitation and let or sublet separately, and includes premises used partly for human habitation and partly for business, trade or professional purpose;
>
> Provided that a building shall not be deemed to be used partly for human habitation by reason only that it is occupied by one or more persons as caretakers.

The present definition of 'premises' in the Act is the same as it appeared in the Control of Rent Ordinance 1956. The definition of 'premises' in the Control of Rent Ordinance 1949 was wider. In *Evelyn Saw Hee Li v Gan Tit Sun* [1959] MLJ 146, an action for vacant possession, the tenant contended that he had been occupying the premises for more than 29 years paying a ground rent first at 50¢ per month and later at RM1 per month. The landlord had sent a notice terminating the tenancy but the tenant challenged its validity and relied on the Control of Rent Ordinance 1956. Rigby J said at p 147:

> For a tenant, therefore, to claim the protection of the Ordinance, he or she must first bring the subject matter of the tenancy within the definition of 'premises comprised in a tenancy'. ... It seems to me clear beyond argument that the words 'includes any land ... occupied therewith' relate back to the earlier part of the definition and that land, as such, cannot come within that definition of 'premises' unless it is land occupied with a dwelling house, flat, etc. The decision of McElwaine CJ in the case of *ALMM Muthukaruppan Chettiar v Haji Ibrahim* [1941] MLJ 150 appears to me directly in point. Land is not 'premises' within the meaning of this Ordinance. The plaintiff is not asking for an order for the ejectment of her tenant from any premises. She is asking for the recovery of a piece of land now in the occupation of the defendant. In my view, on the definition of 'premises' as it now stands in the Control of Rent Ordinance 1956, land, qua land, does not come within the definition of 'premises', and therefore if a person chooses to take a lease of a piece of land and builds a house on it, whether it be with or without the consent of the owner of the land, he cannot thereafter avail himself of the protection of this Ordinance as it now stands.

In *Tan Tuan Chin v Chen Wei Yin & Anor* [1967] 2 MLJ 222 it was held that the consensus of better opinion is that land by itself is not protected

by the Act. Salleh Abas FJ (as he then was) in writing for the Federal Court in *Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321 said at p 323:

> The Act inter alia protects a tenant who rents a house from his landlord, where the house was built before 31 January 1948. It has nothing to do with the case of a tenant who rents only the land but owns the house, ie the Act does not apply where the landlord does not own the house.

As the plaintiff in this appeal has only rented the land to the defendant the Act has no application. To that extent the learned magistrate has erred in his finding that the Act applies to this case.

Whether the defendant had acquired a tenancy coupled with an equity?

It was the finding of the learned magistrate that the defendant had acquired a tenancy coupled with an equity. Learned counsel for the plaintiff contended before me that there was insufficient evidence to bring into existence this type of tenancy as there was no inducement of any kind by the plaintiff and, in any event, that the compensation awarded was unreasonable.

The law relating to a tenancy coupled with an equity was admirably dealt with by Edgar Joseph Jr FCJ, in his usual inimitable style, while sitting in the High Court in *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352. That landmark judgment is sufficient on its own, without the need for any further research, to resolve any problem that may arise in the complex field of proprietary estoppel. It is so inundated with a wealth of authorities that it would be superfluous for me to attempt any further discussion on the subject. I shall refer to some cases from that judgment insofar as they are relevant for the purposes of this appeal. His Lordship referred to *Ramsden v Dyson* (1866) LR 1 HL 129 where Lord Kingsdown said:

> If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promises or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, the court of equity will compel the landlord to give effect to such promise or expectation.

His Lordship referred to a number of cases on the instances when the equity will arise. *Inwards & Ors v Baker* [1965] 2 QB 29 was a case of active encouragement since the father there had persuaded his son to build a bungalow on the father's land. An equity would also arise where the landowner merely encouraged the builder's belief passively, as where the mortgagees stood silently by while a purchaser, in ignorance of the mortgage, built on the land (see *A-G of Hong Kong v Humphreys Estate (Queen's Garden) Ltd* [1987] AC 114, *Haslemere Estate Ltd & Anor v Baker & Ors* [1982] 1 WLR 1109). His Lordship then added at p 408:

> Similarly, I am not persuaded that to raise an equity, it is essential that the representator must have knowledge that his property was being improved.

> The representator's conduct and the subsequent action and belief of the representee may render it unconscionable for the representator to insist on his strict legal rights.

The law adverted to thus far makes it patent that it is not necessary for there to be active encouragement on the part of the landlord to raise an equity in favour of the tenant. In his evidence the defendant said that the plaintiff did not raise any objections to the repairs carried out by him. The plaintiff's house was behind his house by about ten feet away. Obviously she was aware of what was going on and continued with the tenancy. This clearly amounts to passive encouragement on the part of the plaintiff sufficient to create an equity in favour of the defendant.

Edgar Joseph Jr FCJ also dealt in his judgment with the remedies available in cases where a tenancy coupled with an equity had arisen. His Lordship said at p 409 that the authorities show a wide variety of solutions reached in cases in which a person has expended money on the property of another. In *Inwards & Ors v Baker* [1965] 2 QB 29 the Court of Appeal held that despite the legal title being with the plaintiffs, the son had an equity to remain in the bungalow 'as long as he desired to use it as his home'. In *Siew Soon Wah & Ors v Yong Tong Hong* [1973] 1 MLJ 133 the Privy Council held that there was an equity or an equitable estoppel protecting the defendant in his occupation of certain premises for 30 years. The court may also give relief to the person who has incurred expenditure on another's land by giving him an equitable lien on the property for his expenditure (see *Raffaele v Raffaele* [1962] WLR 238) or for the value of his improvements (see *Neesom v Clackoon* (1845) 4 Hare 97). On the other hand, if the evidence showed that the prejudice suffered by the person who made the improvements had been fully satisfied or, in other words, that he already had 'sufficient satisfaction' for his expenditure, he will obtain no further relief (see *A-G v Balliol College Oxford* (1774) 9 Mod 407). In *Kalimuthu v S Kandiah* [1976] 2 MLJ 217 the tenant was not awarded any compensation but was given a bit of time to give up vacant possession. In his concluding remarks on the remedies available Edgar Joseph Jr FCJ said at p 411:

> In my view, generally speaking, a solution which says that the person making the expenditure or the improvement on another's land is to have everything or nothing may rightly be described neither right nor fair and would also be clumsy and unsuitable. The correct approach should therefore be to protect that person against interference for long as he would be prejudiced thereby.

In the *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352 there was evidence of 'sufficient satisfaction' to disentitle the tenant to any relief. In the appeal before me there was no such evidence. There is nothing on record to show that the defendant has reaped benefits from the use of the premises to such an extent for me to rule that there was 'sufficient satisfaction' of the equity. Therefore I agree with the learned magistrate that the defendant is entitled to compensation on the facts of this case. However, I am of the view that the order of

compensation made by the learned magistrate is slightly on the high side. However, the need to interfere with it did not arise in view of the order that I made in this appeal.

I interpolate to refer to the contention of learned counsel that equity is incompatible with the provisions of the National Land Code 1965. This is answered for me by Edgar Joseph Jr J (as he then was) in his illuminating judgment in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 where his Lordship after referring to a plethora of cases said at p 222:

> An important question which arises for decision concerning this part of the case is: what is the role of equity under the Code? ...
>
> Professor Visu Sinnadurai in his book on the *Sale and Purchase of Real Property in Malaysia* on the question whether equitable principles are applicable under the Code opines (at p 206), — and I agree with him — that 'it is now well settled that they do'.

Whether the notice to quit was served on the defendant and its legal effect

In her evidence the plaintiff said that she raised the rent on 1 January 1993. The pleading in para 7 of the statement of claim is also to that effect. That date, therefore, is the date of the new tenancy based on the increased rental. However, the first notice to quit was allegedly dated 16 June 1993 to take effect from 15 July 1993 and the second notice was dated 18 October 1993 to take effect from 17 November 1993. I pause to add that on the facts of this case only the second notice is relevant. The plaintiff said in her evidence that the notices were sent to the defendant. PW2 said that she had knowledge about the notice being sent to the defendant by the solicitors. The defendant in his evidence said that he did not receive any letters from the plaintiff but added that he was informed verbally that she did not wish to rent the premises to him anymore. The notices were not tendered in evidence. The learned magistrate said in his grounds of judgment that the 'notis penamatan yang diberikan oleh pihak plaintif juga tidak sempurna dan tidak mengikut syarat-syarat yang patutnya.'

The law regulating a notice to quit is settled. A notice to quit is a notice given to terminate a tenancy in accordance with the provisions, whether express or implied, of the tenancy. The effect of a valid notice will be to terminate the current tenancy on the date of termination. Though no particular form of notice is required it must not be ambiguous (see *Chen Chi Wei v Khoh Keng Chong* [1951] MLJ 204). The length of notice depends on the period of the tenancy. In the case of periodic tenancies of less than a year, the notice to quit must be one full period, expiring at the end of a completed period. Therefore, a weekly tenancy requires a week's notice and a monthly tenancy requires a month's notice. If insufficient notice had been given, it would be ineffective to terminate the tenancy (see *Mohamed Din v Sockalingam Chettiar* [1946] MLJ 134; *Yeoh Pang Kwan v William Janz* [1972] 1 MLJ 25). In *Abdul Murthalib bin Hassan v Maimoon bte Haji Abd Wahid* [1992] 2 MLJ 108, Lamin J (as he then was) said that where the notice to quit is invalid the tenant continues to have exclusive possession of the premises. In *Ko Teck Kin v Watkinson* [1961] MLJ 73

where a monthly tenancy commenced from 1 April 1959, a notice to quit dated 20 August 1959 to expire on 15 September 1959 was held invalid as a full period's notice was not given. Buttrose J said in that case:

> Putting the question in another way, can the defendant determine his monthly tenancy in the middle of a current month of the tenancy or must it be at the end of it?
>
> It is well established that in a monthly tenancy the period of the notice to quit, in the absence of special agreement, must correspond with the length of the tenancy and must determine at the end of a periodic month from the commencement of the tenancy. If authority is required see *Queen's Club Garden Estates Limited v Bignell* 39 TLR 496, *Precious v Reedie* [1924] 2 KB 149 and *Lemon v Lardeur* [1946] KB 613. ...
>
> ... It failed to comply with one of the conditions which the law prescribes namely, that where the tenancy is a monthly one it should expire at the end of a month from the date of the commencement of the tenancy.

Accordingly, where a tenancy commences on the first day of a month it can be lawfully terminated only if it is made to determine on the last day of the month. In *Harty v Kolman* [1977] 1 NSWLR 674 it was held that a tenancy from month to month is determined by a notice to quit expiring either on the day of the month corresponding to that of the commencement of the tenancy or on the day before, and in such a case, a notice so expressed as to expire on a specified day or at the expiration of the current month of the tenancy which shall expire next after the end of a month from the service of the notice effectively terminates the tenancy.

The notice takes effect from the time it is served on the other party, not the date of the notice or the day it was sent (see *Soon Peng Yam (Pte) Ltd v Grant Irene* [1984] 1 MLJ 153). In this regard I refer to *Muniandy a/l Thamba Kaundan & Anor v D&C Bank Bhd & Anor* [1996] 1 MLJ 374 where Edgar Joseph Jr FCJ said at pp 382–383:

> It is obvious that 'sending' a notice is a far cry from 'serving' a notice and I had, during the argument, pointed this out to counsel for the chargees, and he readily agreed with this proposition. Indeed, there was no proof of posting of this notice ...

Thus if it is intended that a notice to quit is to take effect on a certain date then it should be served on the tenant before that date. It need not be served on him personally. A notice left at a tenant's house, but not served on him personally, is effectual if it can be proved that it actually came to his hands in time to give him notice of the proper length (see *Lim Kien Mok v BH Kevan* [1963] MLJ 284). Where a notice is sent through the post, the presumption is that it is delivered in the ordinary course of business (see *Abdul Ghaffar v Perbadanan Pembangunan Bandar* [1986] 2 MLJ 158). However, because this presumption can be rebutted by evidence to the contrary it is always wiser to have the notice sent by registered mail or recorded delivery (see *Indo-Australian Trading Pte Ltd v Pakiri Kothandapani* [1986] 1 MLJ 289). It therefore follows that there must be evidence of service of the notice to quit.

As I said earlier the new tenancy with the increased rental commenced on 1 January 1993. Since it commenced on the first day of a month the notice in question, purporting to expire in the middle of a current month, is defective. As a notice to quit is a critical piece of evidence in a proceeding for vacant possession it ought to have been tendered in evidence in this case. I must also add that as a notice to quit must be specific in its requirement for the tenant to vacate, it is yet another reason why it should have been tendered in evidence. Its importance assumes monumental significance in the light of the denial by the defendant of the receipt of the notices in paras 11 and 12 of his statement of defence. This ought to have put the plaintiff on red alert to prove service of the notice to quit which she has failed to do. In the circumstances this is an appropriate case where s 114(g) of the Evidence Act 1950 should be invoked against the plaintiff. Accordingly, the tenancy has not been effectually terminated for three reasons:

(1) The notice to quit is defective;

(2) It has not been served on the defendant; and

(3) It has not been tendered in evidence.

As the tenancy has not been brought to an end lawfully, the learned magistrate ought to have confined the order that he made to merely dismissing the plaintiff's claim without more ado. In the course of hearing the appeal I invited both counsel to address me on the validity of the peculiar order made by the learned magistrate. He had dismissed the action and, in the same breath, made an order in the alternative for vacant possession subject to payment of compensation of RM10,000 within six months. This is tantamount to dismissing the claim and at the same time allowing it. In the light of his findings on the notice to quit he ought to have just dismissed the action with costs. Learned counsel for the plaintiff merely said that the order is 'confusing' while learned counsel for the defendant invited me to make any order as I thought fit.

I considered sending the case back to the trial magistrate to rectify the error as the correction to be made would be against the interest of the appellant. I reminded myself of s 29 of the Courts of Judicature Act 1964 which states that all civil appeals shall be by way of re-hearing. In *Government of Malaysia v Zainal bin Hashim* [1977] 2 MLJ 254 Suffian LP in speaking for the Federal Court said that as appeals are by way of re-hearing an appellate court may give any judment, make any order which ought to have been given or made by the trial court and make such further or other orders as the case requires. However, the appellate court will not normally disturb the findings of the lower court if the triability of an issue was dependant on evidence and fact as opposed to an issue of law (see *Huo Heng Oil Co (EM) Sdn Bhd v Tang Tiew Yong* [1987] 1 MLJ 139). Furthermore, under s 33 of the Courts of Judicature Act 1964 where the record of proceedings in any civil proceedings in a subordinate court comes to the knowledge of the High Court, the High Court may give such orders thereon, either by directing a new trial or otherwise, as seems

necessary to secure that substantial justice is done. A matter before the High Court through an appeal will fall within the ambit of s 33. As the grounds for not allowing the claim are anchored on the notice to quit, and that being a question of law, I decided to deal with the matter myself in order to save time and inconvenience to the parties. Additionally, sending the case back to the learned magistrate for remedial action will also increase the backlog of cases pending in the lower courts when I can easily rectify the error here.

In the upshot, I dismissed the appeal with costs and directed that the order made by the learned magistrate be varied by deleting the alternative order that he had made.

Appeal dismissed.

Reported by Lew Chee Seong